the policy need to avoid the stultification of the law that otherwise would follow, and hence to promote coherence in the law. That is, policy-motivated reasons for and against restitution exist independently of those based on conditional or vitiated intention unjust factors. It is true that, on most occasions involving illegality, there will also be an alternative unjust factor present in the pleaded fact pattern involving qualified or vitiated intention. Common examples are mistake or (as in *Equuscorp*) failure of consideration. But sometimes the policy of promoting coherence in the law will itself dictate or preclude restitution, whether or not any independent qualifying or vitiating unjust factor exists. The best known example of this is the *Woolwich* claim (after *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] A.C. 70), which is primarily founded on the principle of no taxation without legislation. It is well-known that recognition of the *Woolwich* claim responded to the lack of relevant qualifying or vitiating factors to support restitution in that case. Restitution was nonetheless required in order to uphold (promote the coherence of) the overriding principle.

The categorical distinction between policy-motivated reasons for restitution and restitution responding to imperfect intention unjust factors is no sterile exercise in taxonomy. It has important ramifications both in terms of the requisite elements of the claim (in particular, around issues of causation) and for available defences such as change of position (in the *Woolwich* context, discussed in [2012] 1 L.M.C.L.Q. 122). While the High Court of Australia did not have to address this broader issue directly in *Equuscorp*, the clear tenor of its discussion of the relevant policy considerations is undoubtedly consistent with the above analysis and should be welcomed by all concerned with the general impenetrability of traditional approaches to illegality in unjust enrichment. ☙

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SAME-SEX DIVORCE TOURISM COMES TO CANADA

In response to a series of initiatives that may be consigned to the category of "it seemed like a good idea at the time," Bill C-32 was introduced into Parliament in February 2012 to amend the Civil Marriage Act to address the impediments to divorce faced by non-resident same-sex couples who had previously come to Canada to be married.

When same-sex marriages were endorsed by legislation in Canada in 2005 in the Civil Marriage Act, few took note of the long-term implications for those who lived elsewhere. Divorce was probably as far from the thoughts of the happy couples who were planning destination weddings in Canada as are pre-nuptial agreements for most couples; and those who celebrated Canada's ability to provide such hospitality to same-sex couples from abroad seemed equally oblivious to the implications.

Few took account of the fact that if couples travelled to Canada to marry because they would not be permitted to do so in their place of residence, some might want

☙ Assignment; Australia; Illegality; Loans; Unjust enrichment

to return one day for a divorce. The catch is that Canadian courts have jurisdiction to grant divorces only where one of the parties has been ordinarily resident in Canada for a year prior to the commencement of the proceedings.

The problem came to a head in January 2012 when a court had declared itself without jurisdiction to grant a divorce to a non-resident couple who then challenged the residency requirement as a breach of the equality guarantees under the Canadian Charter of Rights and Freedoms. In a surprising move, the Attorney General argued that submissions would not be needed on this question because the marriage was invalid in any event. By that time about 5,000 couples had been married under similar circumstances and there was what the newspapers described as "panic".

Of course, the Attorney General was right. There may have been no defect in the *formal* validity of the marriage, but the marriage of a couple who were not capable of marrying one another under the law of their domicile would lack *essential* validity. In this case, the parties were domiciled in the United Kingdom and Florida. Neither place permitted same-sex marriages. The unfortunate implication was that their marriage was never valid anywhere—not in their home jurisdictions, and not in Canada. Worse than that, all the marriages that had been performed in Canada under these circumstances were also invalid.

Something had to be done. The Government introduced Bill C-32 to confirm the validity of these marriages. Under the Bill, a

> "marriage that is performed in Canada and that would be valid in Canada if the spouses were domiciled in Canada is valid for the purposes of Canadian law even though either or both of the spouses do not, at the time of the marriage, have the capacity to enter into it under the law of their respective state of domicile."

The Bill goes on to give retroactive force to this provision so as to validate the marriages that were cast into doubt by the precipitous submissions of the Attorney General in January 2012.

Would this work? Not on its own. In fact, it could have compounded the problem because it would clarify the validity of a marriage that, for those who needed to come to Canada to obtain it, would probably be invalid in the place where it would be most likely to have practical effect—their place of residence. Validating the marriage would confirm the relationship as a "limping marriage", i.e. one in which the couple is married under the law of one place and not married under the law of another place. A limping marriage can be a harsher outcome than a conclusive determination either that a couple is married or that they are not. In this case, it would result in the validity of the marriage in Canada where the couple could not meet the Divorce Act residency requirements to obtain a divorce and the invalidity of the marriage in the place where they reside, preventing the couple from benefitting either from the marriage or from a divorce.

Accordingly, the Bill also contains a provision for forum of necessity jurisdiction for divorce by authorising courts in the province where a couple was married to grant a divorce provided that the parties have lived separate and apart for a year and they have each been residing for a year in a state where they cannot obtain a divorce because their marriage is not recognised as valid.

Welcome though this remedial legislation may be, it does not complete the picture entirely in that it excludes corollary relief. Some might think that for same-sex couples who are willing to travel abroad to marry, the status would be likely to be sought primarily for personal and symbolic reasons and not for economic or other practical reasons. Alternatively, it might be thought that the availability of corollary relief and the entitlement to it should be a matter for the law and the courts of the couples' residence. Still another explanation could be that making it possible to obtain orders for corollary relief that would need to be enforceable in places where the marriage is not recognised could take Canadian law even further into uncharted waters and increase the possibility of unintended consequences.

Whatever the merits of including or excluding orders for corollary relief, the fact that the law on same-sex unions is in transition in various parts of the world could be the most pressing reason for clarifying the status of same-sex marriages granted to non-residents and for removing impediments to their dissolution. Should these couples have believed that their Canadian marriage was of no legal effect in their home jurisdictions, they might have gone on to conduct their lives as if they were not legally married only to find that subsequent changes in the law of the place of their residence triggered legal effects from their Canadian marriage. At that point, it would be little comfort to know that the Civil Marriage Act had been amended to declare retroactively that their marriage was valid, even if only for the purposes of Canadian law, whatever that means.

While there remains much to work out as matters evolve, one thing seems clear: if it is to hold itself out as a welcoming place for destination weddings, Canada must also become a welcoming place for destination divorces—at least for the couples who had travelled to Canada to marry in the first place. ☞

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DEFAMATION VIA HYPERLINKS—MORE THAN MEETS THE EYE

Hyperlinks make the World Wide Web go round. They find and connect information and content from a wealth of sources on the web including, from time to time, defamatory material. Newton, the owner and operator of a website in British Columbia, posted an article entitled "Free Speech in Canada". The article itself was not alleged to be defamatory of Crookes, a politician. However, it incorporated hyperlinks to other internet websites that contained defamatory material. Notwithstanding requests from Crookes and his lawyer, Newton refused to remove the hyperlinks. Did Newton's act of hyperlinking to internet websites constitute "publication" of the defamatory material? The Supreme Court of Canada in *Crookes v Newton* [2011] 3 S.C.R. 269 responded with an emphatic "no". Though a correct outcome on the facts, there were three distinct judicial approaches emanating from the court that bear scrutiny.

☞ Canada; Divorce; Foreign nationals; Marriage; Residence; Same sex partners; Validity